UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JASON STEVENS,	)	
	)	
Movant	)	
	)	
v.	)	Civil No. 05-10-B-S
	)	Criminal No. 97-45-B-S
UNITED STATES OF AMERICA,	)	
	)	
Respondent	)	

RECOMMENDED DECISION ON 28 U.S.C. § 2255 MOTION

Jason Stevens has filed a 28 U.S.C. § 2255 motion challenging his 116-month sentence for being a felon in possession of a firearm.[1] I have screened this motion pursuant to the expectation of Rule 4(b) of the Rules Governing § 2255 Cases and I conclude that Stevens is not entitled to the relief he seeks. Therefore, I recommend that the Court **DISMISS** the motion because it is facially without merit.

Discussion

Stevens earlier filed a motion under Federal Rule of Criminal Procedure 35 raising a Blakely v. Washington, 542 U.S. __,124 S. Ct. 2531(2004) challenge. After steps were taken to make sure that Stevens wished to proceed pursuant to Rule 35 (as opposed to 28 U.S.C. § 2255 as the United States had assumed in responding thereto) this Court denied Stevens's Rule 35 motion in an endorsed order on the basis that Blakely was not retroactive. (Docket No. 48.)

[1] Stevens is also serving a twenty-seven month federal sentence in Criminal No. 00-86-B-S but he makes no mention of that conviction in his current 28 U.S.C. § 2255 motion and identifies only Criminal No. 97-45-B-S in the caption portion of his pleading.

The United States Supreme Court extended the holding of Blakely to the United States Sentencing Guidelines, see United States v. Booker, 543 U.S. __, 2005 WL 50108 (Jan. 12, 2005), and Stevens has wasted no time in pursuing relief by dint of this elaboration.

The amended judgment in Stevens's criminal case which reduced his sentence from 140-months to 116-months was entered on May 4, 1999. As Stevens indicates in his present 28 U.S.C. § 2255 motion, he did not take a direct appeal. Accordingly, Stevens's year to file a timely 28 U.S.C. § 2255 motion has long since expired. See 28 U.S.C. § 2255 ¶6(1). As a consequence, in view of the type of untimely challenge Stevens tenders, his only hope would be under ¶6 (3) of § 2255 which would give Stevens a year from "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

Assuming that it would be for the District Court in the first instance to make the retroactivity determination under ¶ 6(3), Ashley v. United States, 266 F.3d 671, 674 (7th Cir. 2001) ("A district judge may determine whether a novel decision of the Supreme Court applies retroactively, and thus whether a collateral attack is timely under § 2244(b)(2)(A) or § 2255 ¶ 6(3)."); see also Wiegand v. United States, 380 F.3d 890, 892-93 (6th Cir. 2004) ("The district court here should decide retroactivity in the first instance. If the district court finds Wiegand filed timely, then it can address the merits of his claim."); Dodd v. United States, 365 F.3d 1273, 1278 (11th Cir.2004) ("[E]very circuit to consider this issue has held that a court other than the Supreme Court can make the retroactivity decision for purposes of § 2255 [¶ 6](3)."); accord Murray v. Unites

States, 2002 WL 982389, *1 n.2 (D. Ma. 2002), I have already concluded, in the context of a timely § 2255 motion, that Booker should not be applied retroactively to cases wherein the claim was not raised on direct review. In Quirion v. United States, I reasoned:

> On the same day that Blakely was handed down, the United States Supreme Court concluded that one of Blakely's direct ancestors, Ring v. Arizona, 536 U.S. 584 (2002) -- which applied the principle of Apprendi to death sentences imposed on the basis of aggravating factors -- was not to be applied retroactively to cases once they were final on direct review. See Schriro v. Summerlin, __U.S. __, 124 S. Ct. 2519, 2526 (2004) ("Ring announced a new procedural rule that does not apply retroactively to cases already final on direct review."). In the wake of Blakely, most courts that considered the question have concluded that Summerlin answered the retroactivity question in the negative vis-a-vis Blakely grounds pressed in timely 28 U.S.C. § 2255 motions. See, e.g., Burrell v. United States, 384 F.3d 22, 26 n.5 (2d Cir. 2004) (observing this proposition in affirming the District Court's conclusion that the movant was not entitled to a certificate of appealability on the question of whether Apprendi applied retroactively); Lilly v. United States, 342 F. Supp.2d 532, 537 (W. D. Va. 2004) ("In Summerlin, the Court found that Ring v. Arizona, 536 U.S. 584 (2002), a case that extended Apprendi to aggravating factors in capital cases, was a new procedural rule and was not retroactive. A similar analysis dictates that Blakely announced a new procedural rule and is similarly non-retroactive.") (citation omitted); accord Orchard v. United States, 332 F. Supp, 23 275 (D. Me. 2004); see also cf. In re Dean, 375 F.3d 1287, 1290 (11th Cir. 2004) ("Because Blakely, like Ring, is based on an extension of Apprendi, Dean cannot show that the Supreme Court has made that decision retroactive to cases already final on direct review. Accordingly, Dean's proposed claim fails to satisfy the statutory criteria [for filing a second or successive § 2255 motion].").
>
> The 'merits majority' in Booker expressly affirmed the holding of Apprendi concluding: "Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." U.S. at , 2005 WL 50108, at *15; see also Sepulveda v. United States, 330 F.3d 55, 63 (1st Cir. 2003) ("We hold, without serious question, that Apprendi prescribes a new rule of criminal procedure, and that Teague does not permit inferior federal courts to apply the Apprendi rule retroactively to cases on collateral review."). The fact that Booker applied Apprendi to the United States Sentencing Guidelines, as opposed to a state capital sentencing scheme, would not shift the tectonic plates of the Summerlin

retroactivity analysis.

2005 U.S. Dist. Lexis 569, *7-10 (D. Me. Jan. 14, 2005).

Conclusion

For the reasons stated above I recommend that the Court **DENY** Stevens 28 U.S.C. § 2255 relief.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

January 18, 2005.

STEVENS v. UNITED STATES OF AMERICA
Assigned to: JUDGE GEORGE Z. SINGAL
Referred to: MAG. JUDGE MARGARET J. KRAVCHUK
Cause: 28:2255 Motion to Vacate / Correct Illegal Sentenc

Date Filed: 01/18/2005
Jury Demand: None
Nature of Suit: 510 Prisoner: Vacate Sentence
Jurisdiction: U.S. Government Defendant

Plaintiff

JASON T STEVENS

represented by **JASON T STEVENS**
10182-036
FCC/USP K UNIT
P O BOX 1033
COLEMAN, FL 33521
PRO SE

V.

Defendant

UNITED STATES OF AMERICA